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In the Matter of)

Qwest Communications)
International Inc.)

WC Docket No. 02-314

Consolidated Application for Authority)
to Provide In-Region, InterLATA Services in)
Colorado, Idaho, Iowa, Montana, Nebraska,)
North Dakota, Utah, Washington and Wyoming)

To: The Commission

**SUPPLEMENTAL REPLY COMMENTS OF
QWEST COMMUNICATIONS INTERNATIONAL INC.
IN SUPPORT OF CONSOLIDATED APPLICATION
FOR AUTHORITY TO PROVIDE IN-REGION, INTERLATA SERVICES IN
COLORADO, IDAHO, IOWA, MONTANA, NEBRASKA, NORTH DAKOTA,
UTAH, WASHINGTON AND WYOMING**

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UTAH, WASHINGTON AND WYOMING

Pursuant to the Commission's *Public Notice*, DA 02-2438 (September 30, 2002),

Qwest Communications International Inc. hereby submits its Reply Comments in the captioned proceeding. 1/

1/ In its Supplemental Brief, Qwest adopted and incorporated by reference its original applications, and all of its other submissions to the record in support of those applications, in each of WC Docket Nos. 02-148 ("Qwest I") and 02-189 ("Qwest II"). For convenience, the instant proceeding is referred to as "Qwest III." As in the opening Brief, citations herein to Qwest's *ex parte* submissions in the Qwest I and Qwest II dockets refer to the "date/identifier" field in the chronological and thematic indices of *ex parte* submissions and other filings attached to Qwest's Supplemental Brief. Unless otherwise noted, defined terms used herein have the meanings assigned in Qwest's Supplemental Brief and in the Qwest I and Qwest II applications.

These Supplemental Reply Comments are 73 pages long. Qwest is responding in its Supplemental Reply Comments to comments filed by 11 parties, all nine State Authorities, and the U.S. Department of Justice. Accordingly, Qwest respectfully seeks leave to exceed the page limit applicable to this submission.

I. INTRODUCTION AND SUMMARY: QWEST'S APPLICATION IS SUPPORTED BY THE RECORD AND COMMISSION PRECEDENT

The voluminous record amassed in the Qwest I and Qwest II proceedings and in each of the underlying state Section 271 proceedings demonstrates that significant local exchange exists in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming. The record also demonstrates that Qwest satisfies all elements of the competitive checklist in each state and that grant of its request for interLATA authority would serve the public interest and promote the public utility objectives of the Act.

As Qwest explained in its Supplemental Brief, near the end of the statutory review period in the Qwest I proceeding, the Staff raised questions regarding Qwest's compliance with Section 272(b)(2) in light of the pending restatement of Qwest's financial statements for prior periods. When it became apparent that Qwest would not be able to resolve the Staff's questions on this point within the 90-day timeframe for the Qwest I proceeding and because those questions also applied to the Qwest II application, Qwest withdrew both applications on October 10, 2002.

In its refiled application Qwest has provided information regarding Qwest Long Distance Corp. ("QLDC") which will provide interLATA service in the application states following grant. As demonstrated in Qwest's Supplemental Brief and supporting declarations, and as explained in these Supplemental Reply Comments and Exhibits, the creation of QLDC

will not create any need to resolve the legal issues regarding QCC accounts raised in connection with the prior proceedings. The record clearly establishes that Qwest will provide in-region interLATA service in accordance with Section 272.

Commenters opposed to Qwest's interLATA reentry seek to distract attention from Qwest's satisfactory record of compliance with Section 271 by renewing precisely the same

types of arguments that have been considered, and rejected, by the State Authorities in the course of their Section 271 proceedings, and by the Department of Justice in its multiple evaluations of Qwest's satisfaction of Section 271. Once again, however, commenters' objections fail to overcome Qwest's showing of Section 271 compliance or to establish any basis under the Act or Commission precedent for denial of Qwest's application.

Commenters' repetitive, increasingly strident rhetoric must not be allowed to obscure the fundamental fact that Qwest has satisfied the requirements of Section 271 in full. The record here reflects several years of collaborative problem-solving, the expenditure of hundreds of millions of dollars, and the work of thousands of people -- by Qwest, CLECs, and the State Authorities -- to open local markets to competition. Under the ongoing supervision of the State Authorities, CLECs are using new wholesale products and systems to challenge Qwest successfully in the marketplace. The record establishes that these tools will be available to meet future demand as CLECs continue to expand their operations in the Qwest region. And the record demonstrates that the QPAP provides a robust mechanism to ensure that Qwest continues to meet its statutory obligations following grant of interLATA authority.

The State Authorities agree. As in the Qwest I and Qwest II proceedings, each of the nine application states has concluded that Qwest satisfies the requirements of Section 271. ^{2/}

^{2/} See Qwest III Comments of the Public Utilities Commission of the State of Colorado (Oct. 15, 2002) (affirming prior endorsement of Qwest's application for interLATA authority); Qwest III Written Consultation of the Idaho Public Utilities Commission (Oct. 15, 2002) (same); Qwest III Iowa Utilities Board Written Consultation Regarding Qwest Communications International, Inc. (Oct. 15, 2002) (same); Qwest III Comments of the Nebraska Public Service Commission (Oct. 15, 2002) (same); Qwest III Supplemental Comments of the North Dakota Public Service Commission (Oct. 15, 2002) (same); Qwest III Comments of the Public Service Commission of Utah (Oct. 15, 2002) (same); Qwest III Comments of the Wyoming Public Service Commission (Oct. 15, 2002) (same, reiterating "its strong support" for Qwest's application).

For its part, the Department of Justice finds that “the record has improved with respect to certain issues “about which it previously expressed reservations” DOJ Qwest III Evaluation at 4. Accordingly, the Department “recommends approval of Qwest’s application,” subject to this Commission’s independent evaluation. *Id* at 10. These nine State Authorities and the Department of Justice have it exactly right. Now this Commission should clear the way for consumers in each of the application states to begin reaping the benefits of more serious

The Montana Public Service Commission found that Qwest satisfies each of the 14 points on the Section 271(c) checklist. See Qwest II Montana PSC Evaluation. Nonetheless, the MPSC now recommends that the Commission reach a negative public interest finding with respect to the Montana portion of this application because Qwest declined to initiate a full “revenue requirements and rate design case” to address the MPSC’s concerns about the possibility that Qwest’s intrastate access charges impose a price squeeze with regard to intrastate toll rates. Qwest III Comments of the Montana Public Service Commission (Oct. 25, 2002).

Nothing in the Act conditions the grant of Section 271 authorization on a state commission’s support for the application. A state commission’s opposition to an application should not be preclusive where, as here, its sole reason for withholding its endorsement is demonstrably erroneous as a matter of law. In the words of dissenting Montana PSC Commissioner Bob Rowe, “[t]he Montana Commission’s action is an abuse of the Section 271 process” *Id* at 5 (Separate Statement and Dissent of Commissioner Rowe); *see generally* Qwest III Thompson/Freeberg Reply Decl. ¶¶ 18-22. As Commissioner Rowe points out, there is no nexus between intrastate access rates and the critical “public interest” issue implicated by Section 271 – the openness of the *local* market. And the FCC has held that there should be no link between Section 271 approval and access charge reform. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587, 9598 ¶¶ 19-20 (2000) (“*Supplemental Order Clarification*”); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905 ¶ 13 (1996) *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982 ¶ 279 (1997), *aff’d*, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 548 (8th Cir. 1998). To create such a link would impermissibly “extend the terms used in the competitive checklist.” 47 U.S.C. § 271(d)(4). Moreover, there is no intrastate access charge-induced price squeeze in Montana, and Montana law and PSC regulation ensure that one cannot develop. *See* Qwest II Montana Consumer Counsel Reply Comments at 3-5. In any event, Qwest has proposed the commencement of an intrastate access charge collaborative rulemaking proceeding before the Montana PSC that would address any such problem more directly than a Qwest rate case.

interexchange competition and the corollary benefits of a more vibrant local exchange marketplace.

In these Supplemental Reply Comments, Qwest addresses the principal issues raised by opponents of its refiled application. First, Qwest responds to allegations that QLDC is not a legitimate Section 272 affiliate. Qwest demonstrates -- again -- that, quite to the contrary, Qwest LD Corp. is a *bona fide* company that will, following grant, provide interexchange service in full compliance with Section 272. Second, Qwest responds to certain commenters' continued overblown criticism of its OSS and CMP, as well as issues relating to commercial performance. Finally, Qwest addresses certain additional matters, including the state of local competition, checklist compliance generally, matters regarding "unfiled agreements," and AT&T's allegations regarding Qwest's actions during an FCC site visit at the Qwest CLEC Coordination Center in Omaha, Nebraska. As will be shown below, none of these matters (or any of the other issues raised by commenters) provides any ground for denial of Qwest's application for interLATA authority.

Qwest's refiled application demonstrates that local markets in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming are "irreversibly open to competition," *New York 271 Order*, 15 FCC Rcd at 4164 ¶ 429, and that Qwest has fully satisfied the requirements of Section 271. Accordingly, Qwest's Application should be granted promptly

II. QWEST HAS SHOWN THAT THE REQUESTED AUTHORIZATION WILL BE CARRIED OUT IN ACCORDANCE WITH THE REQUIREMENTS OF SECTION 272

A. Background

The record, including the declarations of Marie Schwartz and Judith Brunsting, ^{3/} establishes that in-region interLATA services will be provided in accordance with Section 272. Qwest has over five years of experience complying with Section 272, in its relationships with the originally designated affiliate, Qwest Long Distance Inc. (formerly U S WEST Long Distance, Inc.) ^{4/}; Qwest Communications Corporation; and QLDC, the affiliate that will provide in-region interLATA services upon grant of this application.

QLDC is, contrary to the unsupported suggestions of AT&T, a fully functional company that will be the sole provider of in-region interLATA services upon grant of this application. It is indeed a small company; because it was formed to provide in-region services, it naturally does not provide any services at this time. Therefore its activities to date have been preparatory, and the size of its staff reflects those activities. Qwest 111 Brunsting Reply Decl

¶¶ 2-3

^{3/} See Declaration of Marie E. Schwartz, “Compliance with Section 272 by the BOC,” Qwest I Att. 5 App. A (“Qwest I Schwartz Decl.”); Declaration of Judith L. Brunsting, “Compliance with Section 272 by the 272 Affiliate,” Qwest I Att. 5 App. A (“Qwest I Brunsting Decl.”); Declaration of Marie E. Schwartz, “Compliance with Section 272 by the BOC,” Qwest II Att. 5 App. A (“Qwest II Schwartz Decl.”); Declaration of Judith L. Brunsting, “Compliance with Section 272 by the 272 Affiliate,” Qwest II Att. 5 App. A (“Qwest II Brunsting Decl.”); Supplemental Declaration of Marie E. Schwartz, “Compliance with Section 272 by the BOC,” Qwest 111 Att. 5 App. A (“Schwartz Supplemental Decl.”); Declaration of Judith L. Brunsting, “Compliance with Section 272 by Qwest LD Corp.,” Qwest 111 Att. 5 App. A (“Brunsting QLDC Decl.”); Reply Declaration of Marie E. Schwartz, “Section 272 Compliance by the BOC,” Att. 13 hereto (“Qwest III Schwartz Reply Decl.”); Reply Declaration of Judith L. Brunsting, “Section 272 Compliance by Qwest LD Corp.,” Att. 12 hereto (“Qwest III Brunsting Reply Decl.”).

^{4/} Qwest Long Distance Inc. was dissolved in November 2001

As discussed in the application, QLDC intends to commence operations as a switchless reseller of interLATA services. The Commission has recognized that resale is a good way of introducing new competitors into retail markets because the startup costs can be low. ^{5/} QLDC has recently entered into a resale contract with WorldCom pursuant to which WorldCom will be the underlying facilities-based carrier. Qwest III Brunsting Reply Decl. ¶ 2. Naturally, once QLDC enters this market, it will hire additional employees in order to ramp up its operations.

AT&T observes that QLDC has “far fewer contracts with QC than did QCC, which was a viable, stand-alone company,” and alleges that “the obvious answer is that another Qwest affiliate is providing those services to QLDC.” AT&T Qwest III Comments at 20-21. In fact, some of the services that QC has provided to QCC are for out-of-region QCC operations that are not applicable to QLDC, such as Bill Printing & Processing and Correspondence Center; while other services will not be necessary to carry out QLDC’s current business plan to operate as a switchless reseller, such as Access to Mineral Lab Facility or Wholesale Sales & Service. Qwest III Brunsting Reply Decl. ¶ 4.

QLDC is also in the process of obtaining any authorizations from state telecommunications regulatory agencies that are necessary for the provision of intrastate interLATA service in the application states. QLDC expects to have obtained any necessary

^{5/} See *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Report and Order, 60 FCC 2d 261 ¶ 87 (1976). In the very case that AT&T cites to suggest that QLDC could have no ability to “provide” in-region long distance (see AT&T Qwest III Comments at 18-20), the FCC found that engaging in activities typically undertaken by a reseller is probative evidence of being a “provider” of in-region interLATA service. See *AT&T Corp. v. Ameritech Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 21438 ¶ 37 (1998) (subsequent history omitted).

authorizations by the time this Commission grants Section 271 authority and will comply with applicable state regulatory requirements. See Qwest III Brunsting Reply Decl. ¶ 5.

In sum, QLDC is a distinct entity with a different business plan and books that are not subject to past accounting irregularities. Of course, it is a subsidiary of QCII, as the Act contemplates. QLDC has directors and officers in common with other Qwest companies (but not with QC), and those human resources are part of what makes QLDC a viable entity. QLDC also has hired some employees who were formerly employed by QCC. All QLDC employees have received 272 training and signed an acknowledgement form stating that they understood the training. See Brunsting QLDC Decl. ¶¶ 47-50 & Exhibits JLB-QLDC-14, -16; Qwest III Brunsting Reply Decl. ¶ 10. All QLDC employees had also received 272 training in their prior positions. See AT&T Qwest III Comments at 21; Qwest III Brunsting Reply Decl. ¶ 10.

QLDC therefore stands ready to provide the services for which authorization is sought. As shown in the record and discussed below, QLDC also stands ready to provide those services in accordance with Section 272. ^{6/}

AT&T makes much of its point that “mere ‘paper promises’” do not provide a sufficient basis for a finding that the requested authorization will be carried out in accordance with Section 272. See, e.g., AT&T Qwest III Comments at 14. Of course, Qwest has provided far more than that. The declarations of Ms. Schwartz and Ms. Brunsting provide detailed evidence of mechanisms, procedures, and controls that QC and QLDC have in place to ensure compliance with Section 272. Furthermore, AT&T’s insistence that Qwest’s competitive entry

^{6/} Many of AT&T’s and other parties’ comments on Section 272 were raised in substantially the same form as in the prior proceedings, and Qwest stands on its responses that are already in the record. See, e.g., AT&T Qwest III Comments at 27-28 (significance of KPMG LLP’s 2001 review of QC-QCC transactions); *id.* at 38 (alleged sharing of BOC confidential information); *id.* at 39-40 (compliance with Section 272(g) joint-marketing restrictions).

be deferred until some indeterminate period during which QLDC can develop an operational record for AT&T to review is inconsistent with the Act, and lacks any support in any prior Commission decisions.

As a threshold matter, it is important to recognize that Section 271 requires that the Commission find that “the requested authorization **will be carried out** in accordance with the requirements of section 272.” 47 U.S.C. § 271(d)(3)(B) (emphasis added). Obviously, BOCs will have no prior operational history of in-region interLATA service. Thus, as the Commission has repeatedly recognized, the inquiry is necessarily forward-looking. This contrasts easily with the “present compliance” standard relied upon by AT&T, *see* AT&T Qwest III Comments at 23, which applies only to checklist items. The Commission explicitly distinguished the showing required for Section 272 compliance from the “present compliance” requirement in the very paragraph cited by AT&T:

We note, however, that section 271(d)(3) requires that the BOC demonstrate that its “requested [in-region, interLATA] authorization **will be carried out** in accordance with the requirements of section 272.” 47 U.S.C. § 271(d)(3) (emphasis added). As explained below, this is, in essence, a predictive judgment regarding the future behavior of the BOC. In making this determination, we will look to past and present behavior of the BOC as the best indicator of whether the BOC will carry out the requested authorization in compliance with the requirements of section 272.

Michigan 271 Order, 12 FCC Rcd at 20573 ¶ 55 n.111

It is therefore clear from precedent as well as from common sense that, because the inquiry is a “predictive judgment,” past and present behavior is only an “indicator”; furthermore, the indicator is the behavior of the BOC, not the 272 affiliate.^{7/} Thus, contrary to

^{7/} *See, e.g., New Hampshire/Delaware 271 Order*, Appendix F, ¶ 69 (quoting *New York 271 Order*, 15 FCC Rcd at 4153 ¶ 402) (emphasis added); *see also Second Louisiana 271 Order*, 13 FCC Rcd at 20785 ¶ 321; *Michigan 271 Order*, 12 FCC Rcd at 20725 ¶ 347. Of course, if the

AT&T's insistence, the Commission has repeatedly endorsed Section 272 showings based upon commitments that a BOC knows and understands the relevant provision and commits that the grant of authority "will be carried out" in accordance therewith. 8/

The net effect of AT&T's argument would be that a BOC could not gain competitive entry into the interLATA market without some period of apparently "*years*" of going through the motions with a nonfunctional 272 affiliate — whether or not, as here, it has already opened its local markets to competition. *See* AT&T Qwest III Comments at 29 (emphasis in original). This anticompetitive argument finds no support in any of the Commission's decisions. Indeed, the Commission has acknowledged the possibility that a BOC "may reorganize, merge, or otherwise change the form of [its 272 affiliate] or create or acquire additional interexchange subsidiaries" *after* the BOC files its application, noting only that it would "expect, as [the BOC] represents, that any such subsidiaries designated as section 272 affiliates will meet all of the requirements of section 272" *Second Louisiana 271 Order*, 13 FCC Rcd at 20786-87 ¶ 324 (denying application on other grounds). The Commission also has approved other BOC applications involving 272 affiliates that were only beginning to plan

272 affiliate has been in existence, its record prior to providing such services is certainly relevant to this inquiry. And as noted above, all nine states in these proceedings found QCC to have demonstrated its intention and ability to comply with Section 272 based on the record of compliance by both QCC and its predecessor, Qwest Long Distance Inc. The point here is that the fact that prior history is relevant does not mean that a Section 271 application cannot be granted without the delays necessary to compile such a history.

8/ See, e.g., *Second Louisiana 271 Order*, 13 FCC Rcd at 20789 ¶ 331 (Section 272(b)(4) requirement); *id.* at 20802-03 ¶ 354 (Section 272(e)(3) requirement); *id.* at 20803 ¶ 355 (Section 272(e)(4) requirement); *id.* at 20804-06 ¶¶ 357-360 (Section 272(g)(2) requirement); *First South Carolina 271 Order*, 13 FCC Rcd at 670-71 ¶ 237 (Section 272(g) requirement); *New York 271 Order*, 15 FCC Rcd at 4159-60 ¶ 418 (Section 272(e) requirement); *id.* at 4160 ¶ 419 (Section 272(g)(1) requirement); *Texas 271 Order*, 15 FCC Rcd at 18551 ¶ 402 (Section 272(b)(4) requirement); *id.* at 18556 ¶ 412 (Section 272(e) requirement).

and prepare to offer in-region interLATA services in the future, just as QLDC is now, at the time the BOC filed its 271 application. ^{9/}

Nor has the Commission imposed any requirement of a pre-approval audit or other “test[ing]” ^{10/} on any such 272 affiliate, regardless of whether it has or has not provided any telecommunications services prior to 271 approval. Indeed, the states have uniformly rejected this same argument from AT&T before, ^{11/} because the biennial-audit provision of Section 272(d) makes clear that Congress adopted a much more logical approach. While the question at the time of entry is the “predictive judgment” of whether the authorization “will be carried out” in accordance with Section 272 once the affiliate becomes operational, the purpose

^{9/} For example, Bell Atlantic had established three Section 272 affiliates, one of which was established to serve the other two after Section 271 approval was granted by building an in-region interLATA telecommunications network. At the time Bell Atlantic filed its New York application, that affiliate had only begun to plan construction of the in-region network and was engaged in no other business. See *New York 271 Order*, 15 FCC Rcd at 4153-54 ¶ 405; Declaration of Stewart Verge, *Application by New York Telephone Company (d/b/a Bell Atlantic -- New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc. For Authorization to Provide In-Region, InterLATA Services in New York*, Sept. 21, 1999, ¶¶ 1, 8-13, filed as App. A, Vol. I, Tab 6, to Bell Atlantic Application; see also *Texas 271 Order*, 15 FCC Rcd at 18549-50 ¶ 398 (at the time the Commission issued its decision granting Section 271 approval, the Section 272 affiliate conducted no business aside from the company’s calling card operations).

^{10/} AT&T Qwest III Comments at 28. AT&T makes much of the fact, referred to by Professor Holder, that such an audit is necessary under the federal securities laws before QCII can file its *annual financial statements*. But as noted below, Congress adopted a different approach to promote competitive entry under Section 272 — a demonstration prior to entry that the authorization “will be carried out” in accordance therewith, coupled with a *post-operational audit* every two years thereafter.

^{11/} In the multistate proceedings, the facilitator rejected the notion that Section 272 requires pre-approval “audited operating results” of the kind that AT&T seeks here (see AT&T Qwest III Comments, Holder Decl. ¶ 13), stating “that the ‘biennial audits’ contemplated under section 272(d)(1) do not begin until after market entry under §271. . . . Biennial audits, for example, will have to examine the much-expanded relationships between BOCs and their affiliates after those affiliates enter new markets.” *Multistate Facilitator Report on General Terms and Conditions, Section 272 & Truck A* at 55. AT&T filed no exceptions on this point.

of the biennial audit is to determine *thereafter* whether the BOC “*has complied*” with Section 272’s requirements. 47 U.S.C. § 272(d)(1) (emphasis added). Thus, Congress determined not to require any audit in order to determine eligibility for 271 approval before the 272 affiliate had commenced providing in-region interLATA service. Consistent with that determination, in the *Accounting Safeguards Order* the Commission “require[d] the first audit of BOC compliance with section 272 . . . to begin at the close of the first full year of operations.” *Accounting Safeguards Order*, 11 FCC Rcd at 17631 ¶ 203. This requirement reflects a statutory focus on “an operational period,” *id.*, that begins “*after* receiving interLATA authorization.” 12/

AT&T also alleges that Qwest has somehow “taken the unprecedented action of refusing to permit the relevant state regulatory commissions” to examine QLDC. As shown by the declarations, all of the State Authorities have found that QC and QCC would comply with Section 272, and all of QCC’s practices and training for compliance with Section 272 have been overlaid onto QLDC. After the announcement of the formation of QLDC, AT&T filed motions in every state in Qwest’s region seeking to reopen the records to force more evidentiary hearings, even though Section 271 does not require the FCC to consult with state agencies on Section 272. Not one state agency has granted AT&T’s motion. Eleven states have denied it, nine states

12/ *Texas 271 Order*, 15 FCC Rcd at 18554-55 ¶ 409 (emphasis added); *see also Accounting Safeguards Order*, 11 FCC Rcd at 17631 ¶ 203; Memorandum Opinion and Order, *Accounting Safeguards under the Telecommunications Act of 1996: Section 272(d) Biennial Audit Procedures*, 17 FCC Rcd 1374, 1374 ¶ 2 (2002) (“Section 272(d) requires a BOC (after receiving section 271 authorization) to obtain a joint Federal/State audit conducted by an independent auditor to determine whether the BOC complies with section 272 and the Commission’s implementing regulations.”); *New York 271 Order*, 15 FCC Rcd at 4158 ¶ 416 (“[S]ection 272(d) . . . requires an independent audit of a BOC’s compliance with section 272 after receiving interLATA authorization.”); 47 C.F.R. § 53.209(c) (biennial audits are to be performed on the first full year of operations of the BOC’s separate affiliate).

expressly ^{13/} and two others effectively in their October 15 comments filed in this proceeding. ^{14/}

B. QLDC Will Comply with Section 272(b)(2).

Section 272(b)(2) requires that the *Section 272 affiliate* “maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the [BOC].” Arguments by some commenters pointing out that QC, the BOC, is presently unable to certify its financial statements are not relevant to compliance with this requirement. QLDC, the 272 affiliate, is a newly formed company whose books and records reflect incorporation, financing, set-up and planning activities. QLDC maintains books, records, and accounts that are separate from those of QC and are maintained in accordance with GAAP. Brunsting QLDC Decl. 721. The policies and practices related to the accounting transactions currently under review by management and

^{13/} See Order Denying Motion, Colorado Public Utilities Commission, Docket No. 02M-260T, Decision No. CO2-1184, (October 16, 2002), at 4; Order No. 29137, Idaho Pub. Utils. Comm’n (Case No. USW-T-00-3) (Oct. 23, 2002), at 6; Notice of Commission Action, In the Matter of the Investigation Into Qwest Corporation’s Compliance with Section 271 of the Telecommunications Act of 1996 (Montana Pub. Serv. Comm’n Oct. 10, 2002); Opinion and Findings, Nebraska Public Service Commission, Application No. C-1830 (October 8, 2002), at 1-2; *New Mexico PRC Final Order on SGAT, Track A and Public Interest* ¶ 199; Order on AT&T’s Motion to Reopen, Case No. PU-3 14-97-193, North Dakota Public Service Commission (October 10, 2002), at p. 2; 44th Supplemental Order, Denying AT&T’s Motion to Reopen the Proceeding and Supplement the Record, Washington Utilities and Transportation Commission, Docket Nos. UT-003022, UT-003040 (Sept. 26, 2002) ¶ 1. The decision from Wyoming (October 10, 2002) is an oral ruling and is memorialized in writing in its comments filed in this proceeding on October 15, 2002; the Minnesota Public Utilities Commission issued a unanimous oral decision on October 24.

^{14/} See IUB Qwest III Comments (noting that Iowa Board is unaware of any event since Qwest’s initial filing that would alter its prior positive recommendation); PCSU Qwest III Comments (finding that “Qwest has met the legal standards contained in . . . Section 272”).

KPMG LLP for potential restatement have not been and are not applied by QLDC. Qwest III Btunsting Reply Decl. ¶ 11.

This is not to say, of course, that QLDC's accounting will be free from error. But that is not the standard of Section 272(b)(2). The relevant question is whether a Section 272 affiliate "has implemented internal control mechanisms reasonably designed to prevent, as well as detect and correct, any noncompliance with section 272." **Texas 271 Order**, 15 FCC Rcd at 18549-50 ¶ 398. And particularly given the priority this matter has necessarily taken with QCII's new management team, QLDC's controls have been reasonably designed to ensure that it maintains its books, records, and accounts in accordance with GAAP permits the Commission to make the predictive judgment required by Section 271.

In short, Qwest has demonstrated that QLDC will be a viable long-distance reseller, that its staff has already been trained and recently retrained in the requirements that will apply to its operations under Section 272, and that neither the Act nor the Commission's rules and prior 271 orders restrict Qwest from demonstrating that it will comply with Section 272 through the creation of such a new entity. AT&T's only remaining response to Qwest's showing of Section 272(b)(2) compliance by QLDC is a pure guilt-by-association argument: that the accounting practices and policies currently under review by QCII "seemingly" still apply throughout all "members of the Qwest corporate family." AT&T Qwest III Comments at 24. This argument takes AT&T well beyond either the language or intent of the *Accounting Safeguards Order*.^{15/} But it also fails for two additional reasons.

^{15/} As Qwest demonstrated in its filings on this issue in connection with its prior applications, that order should be read consistently with the purposes of Section 272 to limit the 272(b)(2) accounting requirements for the Section 272 affiliate to BOC transactions, in symmetry with the correlative requirements for the BOC in Section 272(c)(2). But whether that view would apply to QCC is no longer the issue. To disqualify QLDC by reference to past non-

First, the Chief Financial Officer of QCII, Oren Shaffer, has implemented an extensive series of further controls reasonably designed to prevent, detect, and correct any noncompliance with GAAP. ^{16/} AT&T's entire argument (and its reliance upon Professor Holder) simply disregards these changes. ^{17/} Mr. Shaffer has devoted significant time and effort to revising QCII's accounting practices. In that process, Mr. Shaffer has required and reviewed regular reports from the Senior Vice President – Accounting and Financial Operations ("SVP") and from KPMG LLP. Under his supervision, the SVP completed a two-month process of reconciliation, involving approximately 4500 individual accounts in QCII's general ledgers, and established a process of ongoing monitoring of its balance-sheet accounts. Mr. Shaffer has also relied upon the retention of approximately 20 experienced consultants in order to ensure the sufficiency of accounting resources to properly account for new transactions, and the creation of a new Projects and Analysis Group responsible for establishing and managing the accuracy of QCII's books, records, and accounts and implementing internal control enhancements. He has overseen the transfer of supervision over accounting functions from business units to the SVP,

BOC transactions *by QCC, a wholly different Qwest affiliate*, would be supported by neither the language nor the policy of the *Accounting Safeguards Order* (or the Act).

^{16/} See Comments of Qwest Communications International Inc., Qwest I & II *ex parte* 090402d, at 15-16; Qwest I *ex parte* 082602c; Qwest II *ex parte* 082602b.

^{17/} Professor Holder also notes, in the portion of his declaration repeatedly cited by AT&T, that "Qwest does not claim that it has established and implemented new accounting policies for QLDC that are different than those used by QC, QCC and the rest of the Qwest corporate family and that are known to be flawed." AT&T Qwest III Comments, Holder Decl. para. 17. In fact, the policies and practices referred to by Professor Holder that gave rise to QC's inability to certify its financial statements have been revised such that instances of material noncompliance with GAAP are not continuing. Qwest III Schwartz Reply Decl. ¶ 7. Further, the policies and practices related to the accounting transactions currently under review by management and KPMG LLP for potential restatement have not been and are not applied by QLDC. Qwest III Brunsting Reply Decl. ¶ 11.

the hiring of an experienced Assistant Controller, an increase in staffing in the technical accounting group, and the consolidation of accounting responsibilities for cash, accounts receivable, assets, revenues, and other functions. He has also approved the elevation of the controller function to become the **SW**.

Second, as the Reply Declaration of Ms. Brunsting further makes clear, none of the policies and practices related to the accounting transactions currently under review by management and KPMG LLP for potential restatement have been applied by QLDC. Qwest III Brunsting Reply Decl ¶ 11 This is hardly surprising, for as AT&T itself notes, QLDC has recently been formed for the purpose of preparing to provide service as a switchless reseller. It is a newly formed company whose **books** and records reflect incorporation, financing, set-up and planning activities. *Id.* Its transactions with third parties have been minimal. Thus, even if AT&T's reliance upon the potential restatement items for QLDC's affiliates had any legal relevance to QLDC under the language and policy of Section 272(b)(2), it would be factually untenable.

C. QLDC Will Comply with Section 272(b)(3).

AT&T repeats many of the flawed arguments it made on this issue in the prior proceedings, and Qwest's responses are in the record. All that is required for compliance with this section's "separate officers, directors, and employees" requirement is that no person serve as an officer, director, or employee of the Section 272 affiliate while simultaneously serving as an officer, director, or employee of the BOC. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21990-91 ¶ 178. The record shows that there are currently no such overlaps and that mechanisms exist that will prevent such overlaps from occurring. Schwartz Supplemental Decl. ¶¶ 33-39; Brunsting QLDC Decl. ¶¶ 22-24.

Nothing further is necessary to show compliance with this provision. But Qwest has shown that it has taken other steps to separate QLDC's operations from the BOC's. For example, there is no employee of the BOC who reports to any employee of QLDC, nor is there any employee of QLDC who reports to any employee of the BOC. Qwest III Brunsting Reply Decl. ¶ 8. Qwest policies also prohibit loans and transfers of employees and call for employees to be physically separated to the extent feasible. Schwartz Supplemental Decl. ¶¶ 36, 39; Brunsting QLDC Decl. ¶¶ 22d. QLDC employees are, in fact, entirely physically separated from BOC employees. Qwest III Brunsting Reply Decl. ¶ 6. AT&T even criticizes the fact that QLDC employees have the same color on their employee badges that QCC employees display. AT&T Qwest III Comments at 21. The red dot displayed by employees of those two companies serves to identify them as employees of Section 272 affiliates who must, for example, not have access to certain confidential QC information. The same color is used because what matters is that any employee of a Section 272 affiliate is treated in compliance with the requirements of Section 272. The same rule applies to both companies; therefore the same dot is used. Qwest III Brunsting Reply Decl. ¶ 7.

D. QC-QLDC Transactions Will Comply with Section 272(b)(5) and Section 272(c).

Affiliate pricing. Qwest has demonstrated that both QC and QLDC will follow the Commission's affiliate transactions rules, as required by Section 272(b)(5). 18/ AT&T argues that QC and QLDC violate these rules by describing the prices QC posts and makes generally available to interested third parties under Section 272 as "prevailing company prices" ("PCP"). AT&T Qwest III Comments at 33-38

First, AT&T's claim that QC's reliance on PCP is unprecedented is simply inaccurate. *Id* at 35-36; *id*, Selwyn Decl. ¶¶ 13-25. Verizon's BOCs in Delaware, New Jersey, and Pennsylvania similarly use "prevailing market rate" — as opposed to tariffs, fully distributed cost, or fair market value — to price a wide variety of services including billing services, ^{19/} provision of information concerning end-user customers, ^{20/} order entry, customer access database, and number administrative data base services, as well as "marketing systems long distance" services. ^{21/}

Second, what matters under the Commission's rule is not *how frequently* one uses "prevailing company price" as opposed to some other method, but whether one uses it *under appropriate circumstances as defined by the Accounting Safeguards Order*. That Order describes two circumstances where the price of a service or asset constitutes a "prevailing company price":

(1) When BOC-affiliate terms for a service are *not* made publicly available pursuant to Section 272, then neither the BOC nor its affiliate may establish prevailing company prices for affiliate transactions *unless* its annual sales to third parties at that price exceed 25% of its total sales. ^{22/}

^{18/} See Schwartz Supplemental Decl. ¶¶ 56-57; Brunsting QLDC Decl. ¶¶ 29-34; *see also Accounting Safeguards Order*, 11 FCC Rcd at 17595-97, 17607-8 ¶¶ 126-128, 147-48.

^{19/} See <http://www.verizonld.com/pdfs/VLDTransactionDetailWebPage1.pdf> (providing pricing details for billing services agreement *available at* <http://www.verizonld.com/regnotices/detail.cfm?ContractID=1088&OrgID=1>).

^{20/} See <http://www.verizonld.com/regnotices/detail.cfm?ContractID=1130&OrgID=1>

^{21/} See <http://www.verizonld.com/regnotices/detail.cfm?ContractID=983>

^{22/} *Accounting Safeguards Order*, 11 FCC Rcd at 17599-600, 17601 ¶¶ 133-135, 137. The Commission originally adopted a 50% threshold but last year relaxed this requirement by

(2) However, the Commission *does not require* that the BOC or its affiliate meet this 25% threshold when the price must be posted and made available to any third parties who request it under the terms of Sections 272(b)(5) and 272(c)(1). As the Commission stated:

We do allow one exception to our rule that only a product or service for which annual sales to third parties, measured by quantity sold, exceed 50 percent [now 25%] of total sales of that product or service may be recorded by carriers at prevailing price. Section 272 requires BOCs to charge their section 272 affiliates the same rates as unaffiliated third parties for facilities, services, and information. *Because the rates for services subject to section 272 must be made generally available to both affiliates and third parties, we adopt a rebuttable presumption that these rates represent prevailing company prices.* Accordingly, products and services subject to section 272 need not meet the 50 percent threshold in order for a BOC to record the transaction involving such products and services at prevailing price.

Accounting Safeguards Order, 11 FCC Rcd at 17601 ¶ 137 (emphasis added). Thus, in determining to dispense with the 50 percent (now 25 percent) threshold for transactions between a BOC and its Section 272 affiliate, the Commission plainly relied instead on the posting and nondiscrimination requirements of Section 272 as a substitute protection. In other words, the price for a service that QC provides to its 272 affiliate is a prevailing company price when the BOC must *also* provide this same service to any interested third party at the same price under Section 272(c)(1).

decreasing the threshold to 25%. Report and Order in CC Docket Nos. 00-199, 97-212, and 80-286, Further Notice of Proposed Rulemaking in CC Docket Nos. 00-199, 99-301 and 80-286, 2000 *Biennial Regulatory Review -- Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers: Phase 2; Amendments to the Uniform System of Accounts for Interconnection; Jurisdictional Separations Reform and Referral to the Federal-State Joint Board; Local Competition and Broadband Reporting*, 16 FCC Rcd 19911, 19949 ¶ 94 (2001) (“Phase 2 Order”).

AT&T admits that prevailing price treatment applies wherever “the BOC must make the product or service ‘generally available’ to unaffiliated third parties at the same rates.”^{23/} And AT&T’s consultant, upon whose declaration it relies, makes clear that his quarrel is not really with Qwest. Dr. Selwyn simply believes the Commission is *mistaken* in exempting Section 272 transactions, available to third parties under publicly available rates, from the 25% threshold requirement. He concedes that “[t]he Commission determined that offering these services [subject to Section 272(c)(1)’s nondiscrimination requirement] constitutes a check on pricing policies since ‘the rates and services subject to section 272 must be made generally available to third parties.’” And he recognizes that the “[t]he practical result of [its] determination implies that merely offering such services to third parties” is acceptable.^{24/}

Dr. Selwyn essentially asks the Commission to institute a new requirement effectively requiring some unspecified threshold of actual third-party sales for Section 272 transactions. *Id.* ¶ 14. That request might be the appropriate subject of a rulemaking in which all interested parties would have the opportunity for comment, but not a Section 271 application.

^{23/} See AT&T Qwest III Comments at 35. AT&T argues that Qwest’s “joint-marketing services” are *not available* to third parties and claims that Qwest therefore violates the pricing rules by using PCP for joint marketing. *Id.* This allegation is simply incorrect. As AT&T’s own consultant recognizes, “Qwest has not . . . posted a work order contracting for joint marketing services by QC for QLDC,” and it cannot offer such services until it receives 271 authorization. See *id.*, Selwyn Decl. ¶ 19 & n. 19. Of course, when Qwest does offer joint marketing services to its Section 272 affiliate, it will price them at the higher of fair market value or fully distributed costs, as it is required to do when there is neither a tariff nor a generally available “prevailing company price.” But it will not be required to make them available to third parties. 47 U.S.C. § 272(g)(3).

^{24/} AT&T Qwest III Comments, Selwyn Decl. ¶ 16. Nor does the Commission’s prevailing price exception “rende[r] meaningless the FCC’s Fully Distributed Cost/Fair Market Value pricing guidelines.” *Id.* ¶ 24. These guidelines continue to require an FMV-FDC comparison in those circumstances where there is no PCP — e.g., in affiliate transactions outside the Section 272 context and in Section 272 transactions (such as joint marketing or services provided by the 272 affiliate to the BOC) that are not covered by the requirement of general availability.

Dr. Selwyn cites no prior precedent for this “actual sales” requirement for Section 272 transactions, and concedes that the FCC’s “determination” that publicly available 272 transactions are exempt from the 25% threshold requirement does not embody any such requirement. ^{25/} The relevant standard for assessing whether QC and QLDC will comply with Section 272(b)(5) arm’s-length requirement is whether they have shown a willingness and ability to comply with the FCC pricing rules *as they are*, not as Dr. Selwyn would like them to be.

AT&T’s argument is untenable in any event, because it is premised on the unsupported assertion that these services are all unattractive to other carriers. Whether or not AT&T itself would need such services from a third party, there is no reason to believe that billing support services, payroll services, or assistance in general ledger processing ^{26/} would not be desirable for other parties without such internal capabilities. ^{27/} Nowhere in its discussion of prevailing price does this Commission make prevailing-price treatment dependent on such *speculation* about the attractiveness of such services. On the contrary, the Commission stressed in the *Accounting Safeguards Order* that it wished to set out a “*clear definition* of what

^{25/} The passage that Dr. Selwyn misleadingly cites as support for his “actual sales requirement” comes from the section of the *Accounting Safeguards Order* discussing the 50% (now 25%) threshold requirement, which he concedes is inapplicable here. See *id.*, Selwyn Decl. ¶ 20; *Accounting Safeguards Order*, 11 FCC Rcd at 17599-600 ¶¶ 133-135.

^{26/} See Finance Services Work Order, *available at* http://qwest.com/about/policy/docs/QwestLD/documents/WO_FS_QLDC_Amd11_100802.pdf.

^{27/} The only other example that Dr. Selwyn gives of a service he asserts would be of no interest to others is from the “National Consumer Markets Joint Marketing Planning” work order. Here, too, however, this work order includes a variety of services (all identified on the web site) that there is no reason to believe would not be of interest to carriers generally. These planning activities include “planning sales and promotional functions; developing marketing and customer segmentation plans; [and] developing systems and processes to prepare functional areas such as order entry, correcting orders rejected by the order entry system, reporting, analysis, training delivery and sales compensation.” See National Consumer Markets Joint

constitutes prevailing price.” 28/ To this end, it established the two bright-line tests described above: prices count as prevailing prices (1) where 50% (now 25%) of all sales are sold at that price to unaffiliated third parties or (2) in the case of Section 272 affiliates, where such prices are necessarily available to all unaffiliated third parties under Section 272’s nondiscrimination requirement. 29/

As the Commission’s pricing hierarchy makes clear, there is thus no need to calculate FDC or FMV, or to compare the two, where there *is* a prevailing company price. A “prevailing company price” is not defined in terms of FDC; it is rather the price “at which a company offers an asset or service to the general public.” 30/ Thus, while there is no material impact on the FDC calculations from potential restatement items, contrary to AT&T’s

Marketing Planning work order, *available at*

http://qwest.com/about/policy/docs/QwestLD/documents/WO_nbnjmp_092102.pdf.

28/ *Accounting Safeguards Order*, 11 FCC Rcd at 17600 ¶¶ 135 (emphasis added); *Phase 2 Order*, 16 FCC Rcd at 19948-49 ¶ 93.

29/ While a party may rebut the presumption that a price, made generally available under Section 272, is a prevailing price, *see Accounting Safeguards Order*, 11 FCC Rcd at 17601 ¶ 137, AT&T offers no such evidence at all. Indeed, as noted above, Verizon offers similar services (*e.g.*, billing services similar to the “billing support services” Qwest offers as part of its Finances Service Work order) at prevailing company price. *See* Qwest-Qwest LD Corp. Finance Services Work Order, available at http://www.qwest.com/about/policy/docs/QwestLD/documents/WO_FS_QLDC_Amd11_100802.pdf; Verizon Billing Services Agreement, available at <http://www.verizonld.com/regnotices/detail.cfm?ContractID=1088&OrgID=1>. Essentially, Dr. Selwyn, who as noted above disagrees with the Commission’s *Accounting Safeguards Order*, seeks to change the presumption to one *against* prevailing price treatment by requiring that Qwest prove the appropriateness of its use of prevailing company prices. *See* AT&T Qwest III Comments, Selwyn Decl. ¶ 21.

30/ *Accounting Safeguards Order*, 11 FCC Rcd at 17595-96 ¶ 126; *Phase 2 Order*, 16 FCC Rcd at 19948-49 ¶ 93.

claims, 31/ any error in calculating FDC would not make such a calculated price *any less generally available*. [*****CONFIDENTIAL MATERIAL BEGINS** ***

*****CONFIDENTIAL MATERIAL**

ENDS *]**

Posting. Section 272(b)(5) also requires that all transactions between the BOC and its Section 272 affiliate be “reduced to writing” and that information about such transactions be made publicly available. AT&T argues that Qwest’s postings are less detailed than those of all of the other BOCs because it fails to post its “underlying contracts.” AT&T Qwest III Comments at 37. This is the same unfounded argument AT&T made previously about QCC. That erroneous position was rejected by the Multistate Facilitator, to whose decision AT&T took no exception, and by every other state to have considered the matter. Qwest’s web postings satisfy the Commission’s requirements.

Some other BOC postings approved by the Commission do instruct third parties that the underlying contract is available only at the BOC’s offices. 32/ However, QC and QLDC post on the Internet their Master Services Agreement (“MSA”), which contains all of the terms

31/ As Ms. Schwartz notes, given the accounts impacted and the estimated potential restatement amounts relative to the FDC calculation, the impact if any would be de minimis. Qwest III Schwartz Reply Decl. 6.

32/ See generally 272(b)(5) postings at <http://www.verizonld.com/regnotices/index.cfm?OrgID=1>. AT&T neglects to cite this web site in the footnote it offers to support its allegation that “other regional Bell operating companies have posted the underlying contracts between the separate affiliate and the BOC.” See AT&T Qwest III Comments at 37 & n. 118.

and conditions generally applicable to *all* services and assets offered by QC to QLDC. 33/ For each specific service or asset the BOC provides to the 272 affiliate, QC and QLDC also create and post on the Internet a specific “work order” or individual agreement that contains *all* of the additional terms and conditions that apply to that particular service or asset. By posting the MSA, each of its specific work orders, and any individual agreement that is separate from the MSA, QC posts the entire contract for each service and asset provided by the BOC to the 272 affiliate. 34/ QC’s postings for QLDC are **just** as detailed as its postings for QCC, which has been found by every state commission to address the matter to comply with Section 272(b)(5). 35/ Indeed, those state commissions to compare QC’s posting with those of other

33/ QC has not actually provided any assets to QLDC. *See* <http://www.qwest.com/about/policy/docs/QwestLD/overview.html>.

34/ QC also posts a Services Agreement, which will govern all services and assets provided by the 272 affiliate to the BOC, and will post “task orders” for such specific services and assets, as Qwest did for QCC-provided services and assets, if QLDC provides any services or assets to the BOC. As is true for services provided by the BOC, such task orders — considered together with the Services Agreement — will embody the entire contract for every service and asset provided by the 272 affiliate.

35/ *See Multistate Facilitator’s Report on Group 5 Issues* at 10, 66-67 (record supports finding that Qwest’s postings will be “sufficiently complete and detailed and finding use of non-disclosure agreement appropriate); *IUB Conditional Statement Regarding 272 Compliance* at 14-17 (finding web site posting sufficiently detailed under Section 272(b)(5)); *Montana PSC Final Report on Section 272 Compliance* at 29-31 (agreeing that “requiring non-disclosure agreement and on-site examinations constitute appropriate means” of releasing such information); *Washington Commission Twenty-Eighth Supplemental Order* ¶¶ 155, 157 (finding web site postings sufficiently detailed); *Nebraska PSC 272 Order* ¶ 15-16 (finding that web postings include all required information); Order Regarding Section 272 Compliance, *In the Matter of Qwest Corporation’s Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process*, New Mexico Pub. Regulation Comm’n, Utility Case No. 3269, Feb. 13, 2002, ¶¶ 30-31 (“*New Mexico Order*”) (finding web postings sufficiently detailed and noting that use of non-disclosure agreement is “consistent with the FCC’s general guidance on this issue”).

RBOCs found they were comparable in detail to those approved in prior Section 271 proceedings. ^{36/}

The FCC's *Accounting Safeguards Order* does not say, as AT&T insists, that BOCs must post on the Internet *all* of the information on Section 272 transactions that they make available at their headquarters. AT&T Qwest III Comments at 37. Such a rule would have the bizarre consequence that any time BOCs made *confidential* information available to third parties at their headquarters under a non-disclosure agreement, they would have to post precisely the same information on the Internet, effectively destroying its confidentiality. The Commission has never required this result. On the contrary, it specifically recognized that "[w]hile section 272(b)(5) requires BOCs to reduce their transactions to writing and make them 'available for public inspection,' we will continue to protect the confidential information of BOCs, as well as other incumbent local exchange carriers." *Accounting Safeguards Order*, 11 FCC Rcd at 17593-94 ¶ 122. What the Commission actually said was not that a BOC would have to post on the Internet *all* information (even confidential information) that it provides at its offices, but rather that when it did make certain information publicly available on the Internet, such information "must also be made available for public inspection at the principal place of business of the

^{36/} The New Mexico Commission found, for example, that "Qwest's disclosures generally provide the same level of detail respecting the rates, terms, and conditions of its affiliate transactions that SBC and Verizon provide on their Websites." *New Mexico Order* ¶ 30. The Washington Commission also concluded that Qwest's web site disclosures are "comparable to the scope of information available on the other RBOC websites." *Washington Commission Twenty-Eighth Supplemental Order* at ¶ 155. See also Order, *In the Matter of U.S. West Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Arizona Corporation Commission, Docket No. T-00000A-97-0238, April 19, 2002, 178 (finding that "Qwest's postings provide the detail required by the FCC").

BOC.” *Id.* This argument is no more plausible now than it was when the Commission first rejected it in the SBC-Texas 271 proceeding. 37/

“**Backdating.**” AT&T characterizes “backdating” — or entering into contracts that have an effective date several days prior to an execution date — as a Section 272(b)(5) violation. *See* AT&T Qwest III Comments at 36. As *Dr. Selwyn* concedes, this is “a common business practice.” 38/ Nor is it inconsistent with the Commission’s rules, which expressly allow a BOC a period of ten days after executing a transaction in which to make such a posting. *See Accounting Safeguards Order*, 11 FCC Rcd at 17593-94 ¶ 122. Thus, these rules specifically contemplate making services available to unaffiliated entities *later* than the BOC makes them available to the 272 affiliate. 39/

QLDC’s reliance upon QCC’s experience. AT&T notes that QLDC “appears to have never paid anything for the numerous controls and systems it identifies as now at its disposal to meet the requirements of section 272.” AT&T Qwest III Comments at 17. Of

37/ **Texas 271 Order**, 15 FCC Rcd at 18553 ¶ 407 (rejecting AT&T’s claim that SBC was obliged to provide confidential billing detail and finding that that SBC’s method of making such information available only at its office pursuant to a “nondisclosure agreement has not adversely affected [SBC’s] ability to comply with section 272(b)(5) to date because all transactions were properly posted on the Internet.”).

38/ AT&T Qwest III Comments, *Selwyn Decl.* ¶ 36 (“back-dating contracts may often be a common business practice”).

39/ Nor does this fact raise a 272(c)(1) issue, as AT&T suggests. Section 272(c)(1) simply requires a BOC to “provide to unaffiliated entities the same goods, services, facilities, and information that it provides to its section 272 affiliate at the same rates, terms, and conditions.” *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 22000-01 ¶ 202. It does not require the BOC to engage in *any* process of negotiation with third parties for the provision of any services *not already fully governed by the BOC’s posted contracts with its 272 affiliate*. Thus, a third party will never be entitled to ask to obtain service with respect to transactions subject to the posting requirements in advance of working out the contract terms: all of those terms will already have been established and published on the Internet.

course, as discussed earlier, QLDC has hired some employees, including Ms. Brunsting, who had been employed by QCC and had developed expertise in compliance with Section 272. To suggest that a new long-distance company may not hire employees who already understand and know how to comply with applicable law is absurd. Nor is there any impermissible cross-subsidy from QLDC's familiarity with the work that QCC has already paid for in planning for joint marketing. The Commission has construed Section 272 to require application of the affiliate transaction rules to transactions between a BOC and a 272 affiliate. *Accounting Safeguards Order*, 11 FCC Rcd at 17558 ¶ 44. And "protecting ratepayers from cross-subsidizing competitive ventures is a primary goal behind all [the] cost allocation and affiliate transaction rules." 40/ Accordingly, a BOC's cross-subsidization of the operations of its 272 affiliate is a legitimate concern under Section 272. But here, QC is not cross-subsidizing QLDC with respect to joint-marketing-planning services. Rather, Qwest is fully complying with Section 272 and the affiliate transaction rules.

First, there is a work order in place between QC and QLDC that properly reflects the present or future provision of these services. Any prospective joint-marketing-planning services that QC provides to QLDC will be billed and accounted for pursuant to that work order. Thus, QC cannot cross-subsidize QLDC on a prospective basis.

Second, QC's past provision of joint-marketing-planning services to QCC was similarly reflected in a work order, posted, accounted for, and billed.

Thus, in all instances — past and present — Qwest applied the FCC's affiliate transaction rules to QC's provision of joint-marketing-planning services. Because QC and its

40/ *Id.* at 17550 ¶ 24; *see also id.* at 17586 ¶ 107 (noting that the "affiliate transaction rules were designed to protect ratepayers from subsidizing competitive ventures of incumbent local exchange carriers' affiliates").

ratepayers were (and will be) properly compensated for these planning services, there is no cross-subsidy.

Nor does AT&T's suggestion that this is a "chaining transaction" undermine this conclusion. *See* AT&T Qwest III Comments at 31 & n.88. In the *Accounting Safeguards Order*, the Commission determined that "[u]nder the principle of 'chain transactions,' [the] affiliate transaction rules also apply to any transactions between the section 272 affiliate and a nonregulated affiliate of the BOC, such as a services affiliate, that ultimately result in an asset or service being provided to the BOC." ^{41/} In other words, where a 272 affiliate provides an asset or service to another nonregulated affiliate, which in turn provides the asset or service to the BOC, the affiliate transaction rules apply to the pricing of the transaction between the 272 affiliate and the other nonregulated affiliate. *NYNEX CAM Order*, 3 FCC Rcd at 5981 ¶ 24. *NYNEX CAM Order*, 3 FCC Rcd at 5981 ¶ 24 This is to ensure that regulated carriers cannot use inflated prices for transactions between nonregulated affiliates as a means to inflate the regulated carrier's costs. *See id.* at 5980 ¶ 23.

There is no support for AT&T's suggestion, however, that the affiliate transaction rules apply to any other transactions between nonregulated affiliates — even where the services or assets were originally *provided* (as opposed to ultimately *received*) by the BOC. As noted above, where the BOC provides an asset or service to QCC, the affiliate transaction rules apply to that transaction, and ensure that the BOC (and its ratepayers) **are** not cross-subsidizing nonregulated activities. Thus, regardless of whether the nonregulated affiliate later provides the

^{41/} *Accounting Safeguards Order*, 11 FCC Rcd at 17623 ¶ 183 (citing *In the Matter of NYNEX Tel. Cos. Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, Memorandum Opinion and Order, 3 FCC Rcd 5978 (1988) ("*NYNEX CAM Order*")).

asset or service to a second nonregulated affiliate, it is neither a chaining transaction nor an improper cross-subsidy. ^{42/}

Finally, QLDC's use of the results of the joint-marketing-planning services that QC previously provided to QCC does not otherwise create a situation in which QC has avoided the posting and nondiscrimination requirements of Section 272 through the use of a second, nonregulated affiliate. ^{43/} Indeed, at all times that QC provided these services, the services were properly posted on the Internet and offered on a nondiscriminatory basis.

III. QWEST'S OSS COMPLIES WITH THE REQUIREMENTS OF SECTION 271

If a consistent theme has emerged in the OSS-related comments filed in this proceeding, it is that, for the most part, CLECs have failed to raise issues that were not already brought to the Commission's attention – and successfully rebutted by Qwest – in the Qwest I and II proceedings. In the few instances in which CLECs raise new issues, they are anecdotal or lack supporting data. The Commission has routinely held that “anecdotal evidence” or “here unsupported evidence in opposition [to a BOC's application for Section 271 authority] will not suffice.” *New York 271 Order* ¶ 50; *Texas 271 Order*, 15 FCC Rcd at 18375 ¶ 50. The comments filed in this proceeding fail to overcome the substantial, unrefuted evidence that Qwest's OSS meets the requirements of Section 271

^{42/} The Act and the Commission's rules prohibit only *the BOCs* from subsidizing nonregulated activities; nothing in the Act or the Commission's rules prohibits one nonregulated affiliate from subsidizing the activities of another nonregulated affiliate. *Cf.* 47 U.S.C. § 254(k) (prohibiting a telecommunications carrier from using services that are not Competitive to subsidize services that are competitive).

^{43/} See *New York 271 Order*, 15 FCC Rcd at 4158-59 ¶ 416 & n. 1284 (noting concerns raised by AT&T that a BOC might try to “evade its section 272 obligations by chaining transactions through its affiliates”).

A. Pre-Ordering

Hardly a single pre-ordering issue was raised with any specificity by more than one CLEC. This alone suggests that, to the extent issues remain regarding pre-ordering, they are minor. Moreover, aspects of Qwest's pre-ordering processes about which CLECs did voice concerns are easily explainable, particularly in light of the overwhelming evidence that Qwest provides nondiscriminatory access to OSS

1. Loop Qualification Issues

AT&T was the only CLEC to comment with any specificity on Qwest's loop qualification processes. *See* AT&T Qwest III Comments at 51-58, Finnegan/Connolly/Wilson Decl. ¶¶ 21-41. Covad mentions the issue only in passing. *See* Covad Qwest III Comments at 2. As Qwest has demonstrated previously, it handily meets the Commission's requirements for providing loop make-up information to CLECs. *See* Reply Declaration of Lynn MV Notarianni and Christie L. Doherty ("Qwest III OSS Reply Decl.") ¶¶ 17-19. AT&T's comments merely reveal its lack of familiarity with Qwest's loop qualification systems. *See* Qwest III OSS Reply Decl. ¶¶ 21-27, 32 and Exhibit LN-4.

AT&T contends that Qwest does not provide non-discriminatory access to loop qualification information because it does not provide CLECs with direct access to its LFACS database. *See* AT&T Qwest III Comments, Finnegan/Menezes/Wilson Decl. ¶ 22. This is precisely the same claim made by AT&T – and responded to by Qwest – in the Qwest I and II proceedings. *See* Qwest III OSS Reply Decl. ¶ 28. AT&T nevertheless tries to cobble together a new rationale for its claim, arguing in particular that KPMG's work papers from Test 12.7 indicate that Qwest Retail personnel have direct access to LFACS. *See* AT&T Qwest III

Comments, Finnegan/Connolly/Wilson Decl. ¶ 29. This is incorrect; it is belied by KPMG’s correction of certain assumptions in the *Final Report*. See Qwest III OSS Reply Decl. ¶¶ 29-30.

AT&T also tries to make much of the fact that Qwest’s network technicians have access to LFACS for provisioning purposes. But the network engineers who have such access use LFACS for provisioning purposes alone, not to qualify loops in the pre-ordering stages. See *id.* ¶ 31. More importantly, these engineers access LFACS on behalf of **both** CLECs and Qwest Retail as part of provisioning. See *id.* Thus, they do not discriminate against CLECs.

It is worth reiterating that ***each of the application states found that Qwest need not provide CLECs with direct access to LFACS.*** See Qwest III OSS Reply Decl. ¶ 33. AT&T has offered no evidence to call into question the uniform resolution of this issue.

AT&T raises once again the issue of pre-order mechanized loop testing (“MLT”). Qwest addressed the issue of pre-order MLT extensively in the Qwest I and Qwest II proceedings, and, for the Commission’s benefit, reiterates its position in the OSS Reply Declaration. See Qwest III OSS Reply Decl. ¶¶ 34-46; see also Qwest II OSS Reply Decl. ¶¶ 43-57. The MLT issue also has been thoroughly examined in state proceedings. 44/ CLECs have argued repeatedly that they need access to pre-order MLT in order to cure deficiencies in Qwest’s loop qualification databases. However, each of the application states has found that Qwest’s loop qualification offerings are sufficient without a pre-order MLT requirement. Furthermore, this Commission has never suggested that pre-order MLT is a necessary

44/ As part of these reply comments, Qwest has provided an overview of the states’ treatment of the pre-order MLT issue. See Reply Declaration of Nancy (“Lubamersky Reply Decl.”), Att. 7, Exhibit NL-QCCC-1; see also Qwest I Declaration of William M. Campbell, Unbundled Loops, ¶¶ 127-30; Qwest II Declaration of William M. Campbell, Unbundled Loops, ¶¶ 117-20.

component of an ILEC's loop qualification offerings. *See UNE Remand Order*, 15 FCC Rcd at 3885-87 ¶¶ 427-31

AT&T also suggests that Qwest's practice of performing MLTs before it provisions unbundled loops somehow supports the CLECs' position that they should have access to pre-order MLT. Contrary to AT&T's assertion, however, this practice has no relevance to pre-order loop qualification, rather, it involves a post-ordering procedure that generates no loop qualification information that would be of use to CLECs at the pre-ordering stage. *See* Reply Declaration of Mary Pat Cheshier ("Cheshier Reply Decl."), Att. 5, ¶¶ 3-8; Qwest III OSS Reply Decl. ¶¶ 47-50. AT&T's allegation that Qwest performs pre-order MLTs as part of its Retail loop qualification is incorrect. *See* Qwest III OSS Reply Decl. 744.

In short, AT&T has provided no legitimate reason to find fault with Qwest's loop qualification offerings. There is no discrimination or disparity between the pre-order loop information available to CLECs and that available to Qwest personnel. The states have found that Qwest's loop qualification offerings satisfy Commission requirements without direct access to LFACS and without access to pre-order MLT.

2. Other Pre-Ordering Issues

Only WorldCom raised any other concerns regarding Qwest's pre-ordering processes. But WorldCom's assertions are both overbroad and inaccurate, and fail to demonstrate discriminatory conduct by Qwest. WorldCom claims, for example, that Qwest sometimes returns multiple addresses when WorldCom performs address validation queries *See* WorldCom Qwest III Comments at 3, Lichtenberg Decl. ¶ 4. But Qwest's OSS returns precisely the same number of addresses regardless of whether the query is submitted by Qwest or a CLEC. *See* Qwest III OSS Reply Decl. ¶ 11. WorldCom also claims that Qwest rejects LSRs if address

validation and CSR pre-ordering queries are not performed. *See* WorldCom Qwest III Comments at 6, Lichtenberg Decl. ¶¶ 5-6. But this occurs only in three very limited scenarios, and WorldCom's reject rate under those scenarios is exceedingly small. *See* Qwest III OSS Reply Decl. ¶¶ 9-10.

WorldCom also overstates the frequency with which Qwest returns multiple CSRs to CLECs. *See* WorldCom Qwest III Comments at 3, Lichtenberg Decl. ¶ 8. Qwest already has presented this Commission with ample evidence that multiple CSRs are returned only in very limited situations, and that the frequency of multiple CSRs is reduced with each successive release of IMA. *See* Qwest III OSS Reply Decl. ¶ 13. In any case, CLECs are fully capable of determining the proper CSR in the few instances in which multiple CSRs are sent. *See id.* ¶ 14. WorldCom's decision to "not accept customer orders" when Qwest returns multiple CSRs clearly is (in addition to being a curious approach to customer service) beyond Qwest's control. *See* WorldCom Qwest III Comments at 3.

WorldCom's claim that Qwest requires CLECs to perform a separate directory listing inquiry to change a customer's directory listing (rather than obtain the information from the LSR) also is without merit. *See* WorldCom Qwest III Comments at 6-7, Lichtenberg Decl. ¶ 4. The Directory Listing User Document, which is publicly available, provides CLECs with clear and concise instruction on how to obtain the directory information necessary for an order from the CSR. *See* Qwest III OSS Reply Decl. ¶ 16. In short, the claims raised by WorldCom and other CLECs in connection with Qwest's pre-ordering processes do nothing to detract from a finding of compliance in this area.

B. Ordering

WorldCom claims that it must wait until Qwest has updated a CSR to reflect the CLEC's ownership of the account before placing a subsequent order to change features for that customer. See WorldCom Qwest III Comments at 7. But this is the same claim previously made by WorldCom and rebutted by Qwest; it remains untrue. See Qwest III OSS Reply Decl. ¶ 76. Moreover, WorldCom's complaint that Qwest sometimes does not update CSRs for up to five days does not advantage Qwest because the interval for updating CSRs is the same for both Wholesale and Retail accounts. *See id.* ¶ 77. Clearly, there is no discrimination here.

AT&T and WorldCom both complain of high reject rates. See AT&T Qwest III Comments at 61, Finnegan/Connolly/Wilson Decl. ¶ 62; WorldCom Qwest III Comments at 9, Lichtenberg Decl. ¶ 12. But AT&T's argument is precisely the same as the one it made – and that Qwest successfully rebutted – in the Qwest I and II proceedings. See Qwest III OSS Reply Decl. ¶ 53. For its part, WorldCom cites a two-week period during which it alleges that its reject rates were particularly high. *See* WorldCom Qwest III Comments at 9, Lichtenberg Decl. ¶ 12. But nearly half of WorldCom's rejected orders during this period were for reasons within WorldCom's control, and most of the others could have been avoided had WorldCom performed a pre-order address validation query, as Qwest repeatedly has recommended. *See id.* ¶ 54. WorldCom's claim that CLECs that have been able to achieve low reject rates using Qwest's OSS are aberrational also is without merit. WorldCom Qwest III Comments at 9. Qwest provided examples of at least *seven* CLECs (many with high volumes) that have been able to achieve low reject rates for EDI orders in the Qwest I and II proceedings. *See* Qwest III OSS Reply Decl. ¶ 55.

WorldCom contends that nearly all of its pre-ordering and ordering complaints would effectively disappear if Qwest modified its “Conversion as Specified” processes for migrating end users and permitted conversions using only a “Migration by TN” feature. *See* WorldCom Qwest III Comments at 9. AT&T makes a similar claim. *See* AT&T Qwest III Comments at 59-60, Finnegan/Connolly/Wilson Decl. ¶¶ 45, 48, 50-52. But these changes were appropriately considered by Qwest and the entire CLEC community – and prioritized for release in IMA version 12.0 scheduled for April 2003 – through the defined, documented, and adhered to Change Management Process. *See* Qwest III OSS Reply Decl. ¶ 65.

WorldCom tries to blame Qwest for the fact that other CLECs did not ascribe the same level of importance to these features as WorldCom and thus did not support WorldCom’s special request that these features be implemented sooner. *See* Qwest III OSS Reply Decl. ¶ 67; WorldCom Qwest III Comments at 10-11. But Qwest cannot – and does not – control the preferences of CLECs any more than WorldCom. *See* Qwest III OSS Reply Decl. ¶ 67. Qwest attempted to accommodate WorldCom’s request in multiple ways; but ultimately it could not – and did not – depart from its defined and documented processes for implementing new features. *See id.* ¶¶ 68-73. To do otherwise would have violated Change Management Procedures and provided WorldCom with special treatment. *See id.*

The urgency with which WorldCom today characterizes its need for “Conversion as Specified” and “Migration by TN” features comes as a surprise to Qwest. WorldCom was an active participant in the KPMG OSS Test, and, in the course of two full years of testing, never once expressed a desire to use these features. *See id.* ¶ 74. WorldCom states cryptically that it waited until now to pursue these features because it began seriously to consider entering the local market only this year. *See* WorldCom Qwest III Lichtenberg Decl. ¶ 15. But Qwest cannot be

held accountable – or be expected to depart from its clearly-defined processes – for the consequences of WorldCom’s “late-in-the-game” decisions.

Notwithstanding the voluminous evidence already in the docket demonstrating that CLECs can integrate pre-order/order data using Qwest’s OSS, AT&T and WorldCom nevertheless attempt to disparage Qwest’s pre-order/order integration capabilities. WorldCom claims that it has trouble accomplishing pre-order/order integration and that integration with Qwest’s OSS is difficult because Qwest uses non-standard fields for features and details at the pre-order stage. *See* WorldCom Qwest III Comments, Lichtenberg Decl. ¶ 13. AT&T makes a similar claim. *See* AT&T Qwest III Comments at 59. But other CLECs have not reported experiencing these problems and have managed to integrate successfully. *See* Qwest III OSS Reply Decl. ¶ 57. The Department of Justice explicitly recognized that, although AT&T (and, by implication, other CLECs) may prefer that Qwest’s pre-order data fields be maintained in a particular way, the organization of those fields “does not appear to preclude the full and successful integration of pre-order and order functions for all CLECs.” DOJ Qwest II Evaluation at 11. WorldCom’s claims regarding parsing **for** complex orders also is dismissible, as all the relevant information appears on the CSR and can easily be used by CLECs. *See* Qwest III OSS Reply Decl. ¶ 62.

CLEC claims in connection with Qwest’s manual service order accuracy meet a similar fate. Qwest filed a considerable volume of data in the Qwest I and II proceedings demonstrating that the few errors it makes when manually processing orders do not affect the ability of CLECs to compete in the marketplace for local service. *See id.* ¶ 78. CLECs such as Eschelon have not convincingly disputed this data, and instead have offered only anecdotal evidence of problems in this area. *See* Eschelon Qwest III Comments at 20. These anecdotes